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No. 91-459

FILED
OCT 17 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

JOE NELSON and MARGARET NELSON,

Petitioners,

vs.

PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Production Credit Association of the Midlands (respondent) is a short-term lender providing funds for operating expenses and financing the purchase of short-term assets such as cattle, equipment and machinery for borrowers such as Joe Nelson and

Margaret Nelson (petitioners) (Tr. Vol. I, 21; Tr. Vol. II, 76; Tr. Vol. IV, 602). Respondent's loans were made for terms of one (1) year and the notes signed by petitioners would each reveal a maturity date being one (1) year from the date of the note (Tr. Vol. II, 397:13).

Petitioners testified that they knew respondent could choose not to renew their loan at the end of each year (Tr. Vol. VI, 1148). Petitioners' loan had incurred losses in four of six years prior to 1983 and had lost money again in 1983 (Tr. Vol. II, 114; Tr. Vol. VIII, 1627). After his review of the loan in August of 1983, one of petitioners' loan officers, Rodney Uhrig (Uhrig) wrote to petitioners to express his concern over the deterioration of their loan (Tr. Vol. VIII, 1629). In Uhrig's letter, petitioners were told that before the loan would be renewed in November of 1983:

> . . . we will require a definite plan to achieve the necessary debt reduction before consideration will be given to renewal of the loan this fall or financing for the upcoming year.

(Respondent's Appendix, pp. 1a-2a; Tr. Vol. VIII, 1632). Petitioners were further advised by Uhrig that they must achieve substantial debt reduction along with a reduction in operating costs if the loan was to return to a workable cashflow position (Tr. Vol. VIII, 1638). Petitioners testified that they were told by Uhrig that they had to shrink their debt and should consider the sale of assets such as their farm which they leased to a tenant (Tr. Vol. II, 166).

In 1983 and in response to Uhrig's letter, petitioners brought to respondent a plan prepared for them by the University of Nebraska Panhandle Station (Tr. Vol. I, 26). However, the plan required that the capacity of the ranch be expanded by 1,000 feeder cattle which would require approximately $385,000 in additional

funds from respondent (Tr. Vol. VI, 1258). Contrary to petitioner's Statement of Facts contained in their petition for writ of certiorari, Uhrig did not request that petitioners bring in a plan *and* also effect debt reduction (Petition, p. 7), but instead requested a plan *to* achieve the necessary debt reduction (Respondent's Appendix, pp. 1a-2a; emphasis added). In fact, the author of the plan, Pat Reece, when asked to prepare the plan by petitioners and during the preparation thereof, did not even know that petitioners had been requested by respondent to reduce their debt (Tr. Vol. II, 152). Mr. Reece further stated that the plan was simply for grazing management purposes (Tr. Vol. II, 152).

Along with the ranch plan, petitioners maintained that respondent agreed to provide financing for three (3) years from 1983 (Tr. Vol. VI, 1255). However, petitioners admitted to never signing a promissory note with a term longer than one (1) year (Tr. Vol. VI, 1261). Moreover, the meeting at which time the verbal three (3) year commitment was allegedly made by respondent was also attended by Robert Marland, a representative from the Travelers Insurance Company who was a possible long-term financier (Tr. Vol. VI, 1255). Mr. Marland testified that respondent never made such a three (3) year commitment and in fact his understanding from this meeting was that respondent could not commit for longer than one (1) year (Tr. Vol. VII, 1477-1489).

Petitioners' loan was extended and then renewed in February 1984 to allow them time to obtain long-term financing to restructure their debt (Tr. Vol. VIII, 1579). Respondent had originally requested application of at least $400,000 to $500,000 on their loan (Tr. Vol. II, 168); (Respondent's Appendix, pp. 3a-4a). Ultimately, $250,000 from another source was applied to their debt with respondent (Tr. Vol. VII, 1281). However, petitioners again lost money in their operation in 1984 (Tr. Vol. VIII, 1749). To renew their loan in November of 1984, petitioners

signed an agreement which provided that if petitioners did not earn $29,725 in the 1985 operating year as their cashflow projections provided, they would pay off their loan to respondent (Tr. Vol. IV, 689). Petitioners lost approximately $170,000 in 1985 and their loan was not renewed (Tr. Vol. VIII, 1825). A replevin action was instituted by respondent and petitioners claimed protection under the bankruptcy laws which led to this adversary proceeding (Tr. Vol. VI, 1248, 1254).

SUMMARY OF THE ARGUMENT

1. The Seventh Amendment is not contravened when a trial court sets aside a jury verdict and enters a contrary judgment after reserving ruling on a motion for directed verdict.

2. Petitioners' proper course of strategy pursuant to Rule 50 of the Federal Rules of Civil Procedure included filing a motion for new trial after the trial court sustained respondent's motion for judgment n.o.v. As well, petitioners could have urged on appeal that the judgment be reversed and remanded for a new trial. Instead, they simply urged that the verdict should be reinstated.

3. Petitioners request a new trial to fill in the gaps with further proof. However, by virtue of respondent's motions for directed verdict, petitioners could have filled in the gaps by requesting to reopen their case-in-chief or by altering their cross examination of respondent's witnesses.

REASONS FOR DENYING THE WRIT

The power of review by an appellate court is limited by the Seventh Amendment which provides that, ". . . no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law." Therefore,

an appellate court may not weigh the evidence, pass on the credibility of witnesses or substitute its own judgment for that of a jury. *Lust v. Clark Equipment Co.*, 792 F.2d 436 (4th Cir. 1986). However, it has long been held that the question of whether there is sufficient evidence to support submission of an issue to the jury is a legal determination and that the entry of a judgment n.o.v. because of insufficient evidence does not contravene the Seventh Amendment. *Neely v. Eby Construction Co.*, 386 U.S. 317 (1967).

Rule 50(b) of the Rules of Federal Procedure provides that, "Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion". A final judgment entered by the court that is contrary to a verdict could violate the Seventh Amendment unless it is considered a reserved decision on an earlier motion for directed verdict as Rule 50(b) provides. *Benson v. Allphin*, 786 F.2d 268 (7th Cir. 1986); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 585 F.2d 821, 825 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *Grubb v. Federal Deposit Insurance Corp.*, 868 F.2d 1151 (10th Cir. 1989).

The Eighth Circuit Court of Appeals correctly determined that, as a matter of law, there was an insufficiency of evidence. Therefore, the Seventh Amendment was not violated when the court sustained respondent's motion for judgment n.o.v. after reserving its ruling on the motion for directed verdict (Petitioners' Appendix, p. 77). This determination of the sufficiency of the evidence is properly within the role of an appellate court. As stated in *Johnson v. New York, New Haven & Hartford R. Co.*, 344 U.S. 48 (1952):

> A Court is always "deemed to have submitted the

> action to the jury subject to a later determination" of the right to a directed verdict if a motion for judgment notwithstanding the verdict is made "within 10 days after the reception of a verdict . . . ."

Id. at 53. Moreover, the trial court in the present case correctly followed the notion of reserving judgment by stating in response to respondent's motion for directed verdict at the close of the evidence:

> Well, I will simply reserve ruling on the motion, submit the matter to the jury, and what should be done after the jury makes its decision I will either decide or refer to the bankruptcy . . . my guess is that's what I'll do, let it go to the jury and reserve ruling on your motion.

(Tr. Vol. IX, 2007).

Petitioners cite numerous cases in support of the proposition that they should be allowed to make an argument for a new trial. However, the discussion of these cases is seriously misstated by petitioners and the cases simply do not stand for the proposition that petitioners' Seventh Amendment rights to a trial by jury have been violated to justify a request for a new trial.

For example, in *Neely* the trial court denied the defendant's motion for judgment n.o.v. and motion for new trial after a jury verdict. Defendant appealed claiming that its motion for judgment n.o.v. should have been granted. The appellate court held that the evidence at trial was insufficient to establish negligence or proximate cause and reversed the judgment of the District Court with instructions to dismiss the action. Plaintiff, without filing a petition for rehearing, then sought a writ of certiorari to the

Supreme Court and the Supreme Court affirmed the dismissal finding that the appellate court had the power to direct the dismissal. *Neely* is far different from the present case in which respondent's motion for judgment n.o.v. was sustained at the trial court level, not at the appellate level. In *Neely*, the Court stated:

> Likewise, if the plaintiff's verdict is set aside by the trial court on defendant's motion for judgment n.o.v., plaintiff may bring these very grounds directly to the court of appeals without moving for a new trial in the district court. Final action on these issues normally rests with the court of appeals . . . A plaintiff whose jury verdict is set aside by the trial court on defendant's motion for judgment n.o.v. may ask the trial judge to grant a voluntary nonsuit to give plaintiff another chance to fill a gap in his proof. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. at 217, 91 L. Ed at 853.

Id. at 84. The *Neely* Court was concerned with the rights of a litigant whose jury verdict was set aside on appeal as opposed to a verdict which was set aside by the trial court. Where the appellate court sets aside the verdict, the petitioners may have valid grounds for a new trial which should be addressed by the trial court which had better knowledge of the facts and evidence. This was not the situation in the present case as the petitioners had the opportunity to file a motion for new trial with the trial court and chose not to do so.

Similarly, in *American Teachers Systems v. PA. State University*, 688 F.2d 907 (3rd Cir. 1982), the court did not decide the question at issue herein but instead simply remanded that case for further proceedings finding that it was inappropriate for the

lower court to grant a summary judgment against the plaintiff. In their petition for writ of certiorari, petitioners indicate that, *American Teachers Systems,* "revealed its understanding of *Neely* that the remand of the trial court for determination of a new trial was the preferred method, although not mandatory." (Petition, p. 15). *American Teachers Systems,* says nothing of the sort and simply remanded the case based upon a finding by the appellate court that summary judgment entered by the lower court was in error.

Also, in *Systemized of New England, Inc. v. SCM, Inc.,* 732 F.2d 1030 (1st Cir. 1984), the trial court entered a judgment n.o.v. which was vacated by the appellate court. There was no ruling by the trial court as to a conditional motion for new trial which had been filed and therefore the issue was whether the appellate court was to reinstate the verdict or remand to the trial court after vacating the judgment n.o.v. The court found that the only alternative was to remand to the trial court for a determination of whether to grant a new trial or order a remittitur on plaintiff's verdict. Petitioners herein cite *SCM* for the proposition that it, "apparantly reads *Neely* to require a remand for trial court's determination on the suggestion for new trial" (Petition, p. 15). Again, *SCM* says nothing of the sort. Remand was necessary because the defendant's judgment n.o.v. was filed along with a conditional motion for new trial. The trial court reasoned that because it had granted defendant's motion for judgment n.o.v., it did not have to rule on the motion for new trial. However, the appellate court found that such a ruling on the motion for new trial was necessary.

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1946), is also relevant as to the issue of remanding a case to the trial court for a request for new trial. Therein the Court considered a suggestion that a litigant may present affidavits to the appellate court if his verdict is set aside by the appellate court and have

the case remanded for determination of whether a new trial is proper. The Court stated:

> It has been suggested that the Petitioner could have presented affidavits to the Circuit Court of Appeals to support his claim for a new trial, and that that Court could there upon have remanded the question to the District Court to pass upon it. *Such a circuitious method of determining the question cannot be approved.*

(Emphasis added.) *Id.* at 218.

The actions of respondent at trial clearly dictated to petitioners that they proffer all proof that they had to support their claims. In *SCM*, the court stated that:

> The purpose of the Rule 50(b) requirement is to alert the opposing party to the movement's claim of insufficiency before the case goes to the jury, so that his opponent may possibly cure any deficiency in his case should the motion have merit, and also so that the judge may rule on the adequacy of the evidence without impinging on the jury's fact-finding province.

Id. at 1036.

In *Benson v. Allphin*, 786 F.2d 268 (7th Cir. 1986), the court suggested that the filing of motions for directed verdict and judgment n.o.v. allow the non-movant to seek to reopen his case-in-chief, alter his cross-examination of the opponent's witnesses, or offer further evidence in rebuttal. These are all options available to remedy deficiencies in the non-movant's case before the jury retires to deliberate. *McKinnon v. City of Berwyn*, 750 F.2d 1383 (7th Cir. 1984).

Rule 50 of the Federal Rules of Civil Procedure provides that as a prerequisite for filing a motion for judgment notwithstanding the verdict, the party must have first moved for a directed verdict. The record in the present case indicates that respondent moved for a directed verdict at the close of petitioners' case and renewed that motion again at the conclusion of all the evidence (Tr. Vol. VII, 1430; Tr. Vol. IX, 2004). The purpose of these motions was to alert the petitioners of respondent's intentions to file a motion for judgment notwithstanding the verdict and new trial along with further revealing the issues that would be raised by respondent on such motions. If petitioners believed that they were holding back any evidence, they certainly were on notice that such evidence should have been adduced. Respondent should not be prejudiced by petitioners' strategy of not proffering all evidence available to them at the time of trial. Nor should petitioners be able to take advantage of Seventh Amendment protections because of their strategy.

Rule 50(c)(2) of the Federal Rules of Civil Procedure provides that a party whose verdict has been set aside on a motion for judgment n.o.v. may file a motion for new trial after entry of the judgment n.o.v. Petitioners chose to ignore this rule and simply argued that their verdict should be reinstated. The comments to Rule 50 also highlight the procedure which petitioners should have followed that included urging on appeal from the judgment n.o.v. that such judgment should be reversed and also that errors were committed during the trial which at least entitled them to a new trial. Petitioners again chose not to adopt this strategy but only urged on appeal that their verdict should be reinstated.

The Eighth Circuit Court of Appeals entered its order on May 17, 1991 denying the petitioners' request for rehearing and suggestion for rehearing en banc. Included in their petition for rehearing was their request for new trial and the appellate court found that there was no basis for granting the new trial.

Accordingly, there are no sufficient constitutional issues which have been raised by the petitioners. Petitioners fail to cite any affirmative authority for the proposition that the Eighth Circuit Court of Appeals had a duty to consider their request for new trial or remand to the trial court for its own consideration. Instead, petitioners rely upon cases in which appellate courts take action to reverse a lower court ruling such as a motion for judgment n.o.v. and then consider what further action must be taken. In this case the trial court was in the best position to rule on post trial motions and petitioners argue that the trial court is in the best position to review their new trial request. However, such a request should have been made after the trial court sustained respondent's motion for judgment n.o.v.

CONCLUSION

Respondent respectfully requests that the Court deny the petition for writ of certiorari filed by petitioners herein on the basis that no constitutional or significant issues are presented. The United States District Court for the District of Nebraska properly reserved ruling on respondent's motion for judgment n.o.v. Therefore, there was no violation of petitioners' Seventh Amendment rights.

Respectfully submitted,

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Attorneys for Respondent

APPENDIX A — UHRIG LETTER DATED AUGUST 19, 1983

Alliance Production Credit Association

Third and Emerson
P.O. Box 737
Alliance, Nebraska 69301
Telephone (308) 762-5025

Wayne A Goff, President

August 19, 1983

Mr. Joe Nelson
Hickory Route
Alliance, NE 69301

Dear Joe:

After reviewing your additional on Thursday, I completed the enclosed earned change worksheet. As the worksheet illustrates, figures indicate that the loan projects a loss in excess of $38,000 for 1983 with a decline in the PCA's liquid margin position of over $76,000. If this loss materializes, the operation will have posted a loss for the third year in a row, and for four of the past six years. All totalled, the past two years' losses exceed $120,000 (without 1983 projected loss) and the margin in the loan has declined by more than $204,000 since December, 1981.

As I explained earlier this week, we are extremely concerned about your declining financial position, the loan's workability, and your repayment capacity. The increasing negative trend has placed the PCA in the position of presently relying upon real estate security for accurate margin on the loan. As a short-term lender, this

position is unacceptable, as is the increasing risk associated with the loan.

I am confident these problems have been discussed with you in the past and we reviewed them at length last Thursday. You have several options available including sale of livestock and real estate, but the fact remains that your financial position requires substantial debt reduction (more than sale of the cowherd alone can achieve) as well as a reduction in overall operating costs if the loan is to return to a workable cashflow position. This fact has been evident for several years and made only more so with the increase of interest rates.

In light of the foregoing, the association must advise you that we will require a definite plan to achieve the necessary debt reduction before consideration will be given to renewal of the loan this fall or financing for the upcoming year. We also will require a workable, realistic quarterly cashflow within which you will be expected to operate.

Although I realize the sale date of your yearling cattle and maturity of your loan are several weeks/months away, I felt that you should be advised of the necessary terms in advance so that you can give the plans the thought and time they deserve.

I will be happy to discuss any questions with you.

Sincerely,

Rodney S. Uhrig
Credit/Operations Specialist

sjb

APPENDIX B — UHRIG LETTER DATED SEPTEMBER 8, 1983

Alliance Production Credit Association

Third and Emerson
P.O. Box 737
Alliance, Nebraska 69301
Telephone (308) 762-5025

Wayne A. Goff, President

September 8, 1983

Mr. Joe Nelson
Hickory Route
Alliance, NE 69301

Dear Joe:

After you were in Tuesday, I decided to put together some figures regarding a PCA loan reduction program. Although I do not feel that refinancing your present debt is a solution to the problems that your operation faces, it seems that this alternative is the most appealing from your perspective. Therefore, unless we can agree upon a plan for dealing with those problems which is satisfactory to both of us, your alternatives are to either secure financing through another source or to provide the PCA with a sufficient liquid margin to offset the risk position of the loan. In the latter case, our credit decisions and future financing can only be based upon your ability to maintain this liquid position.

As the enclosed analysis illustrates, a conservative estimate of proceeds from sale of the breeding livestock and 1983 production will not exceed $450,000. Your present PCA balance/commitment

and interest estimate for 1983 exceed $750,000; therefore, carryover debt remaining upon renewal (without any additional feeder livestock purchases) will be over $301,000. The only livestock security for the loan at that point would be 254 calves valued at approximately $66,000. This means that the loan would show a negative liquid margin of $235,000.

In order for the PCA to finance a program similar to that which you followed in the past year, a livestock margin position of $200,000 would need to be provided. To achieve this, additional long-term financing of $400,000-$500,000 would have to be obtained to retire the estimated PCA carryover debt, plus purchase of 600 head of calves. From our standpoint, the $400,000 figure is a minimum, since the loan's liquid margin could deteriorate swiftly if your historical loss trend continues.

Finally, I should stress the point which I made earlier, that if you choose to pursue the refinancing route, you should make every effort to obtain the maximum loan possible, since our position will rely almost entirely upon a liquid margin with secondary collateral of machinery and a third mortgage with limited equity. Considering this position, our ability to finance your operation under adversity would continue only so long as the liquid margin could be maintained.

Sincerely,

Rodney S. Uhrig
Credit/Operations Specialist

sjb